BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID JONES,

Claimant,

vs.

CRST EXPEDITED, INC.,

Employer,

and

AIG,

Insurance Carrier,
Defendants.

File No. 5049462

ARBITRATION DECISION

Head Note Nos.: 1400, 1803, 2500, 3000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, David Jones, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on November 14, 2014. Claimant alleged he sustained a work-related injury on July 28, 2014. (Original notice and petition.) A first report of injury was filed on August 7, 2014.

CRST Expedited, Inc. is located in Cedar Rapids, Iowa. For purposes of Workers' Compensation, the employer is insured by AIG Insurance Company. Defendants filed their answer on January 22, 2014. They denied claimant sustained a permanent injury.

The hearing administrator scheduled the case for hearing on April 18, 2016 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Buffy Nelson as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants called Ms. Lana Sellner, vocational consultant, to testify.

The parties offered exhibits. Claimant offered exhibits marked 1 through 24. Defendants offered exhibits marked A through D and F through T. Exhibit E was not admitted. It was withdrawn.

Post-hearing briefs were filed on May 9, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on July 28, 2014 which arose out of and in the course of employment;

3. The alleged injury is a cause of temporary disability during a period of recovery;

4. Defendants have waived all affirmative defenses;

5. Prior to the hearing; defendants paid unto claimant, 25 weeks of compensation at the rate of $305.49 per week; and

6. The parties agree certain costs that are detailed, were paid by claimant and are not in dispute.

ISSUES

The issues presented are:

1. Whether the injury on July 28, 2014 is the cause of a permanent disability;

2. If a permanent disability is found, the extent of the industrial disability;

3. What is the commencement date of any permanent partial disability benefits that may be awarded? Claimant alleges the date is March 4, 2015. Defendants maintain the commencement date is November 3, 2014;

4. What is the proper weekly benefit rate? Claimant alleges the rate is $322.04 per week. Defendants maintain the weekly benefit rate is $285.48 per week. Prior weekly benefits were paid at the rate of $305.49 per week;

5. Claimant is seeking the payment of medical bills as detailed in Exhibit 18; and

6. Claimant is seeking alternate medical care pursuant to Iowa Code section 85.27.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and the other witness at hearing, after judging the credibility of the witness, and after reading the evidence, and the post-hearing briefs makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 50 years old. He is married and resides in Mobile, Alabama with his wife and 2 minor children. He also has 2 adult children who are not dependent on claimant. He is a high school graduate who needed night and summer school to assist him in graduating. Claimant served in the U.S. Army Reserve for 4 to 5 years. He was a food specialist and worked as a cook. Claimant was honorably discharged.

Claimant detailed his employment history in his answers to interrogatories which are marked as Exhibit Q. Some of the prior jobs include: assisting his wife in her travel agency; warehouse manager/supervisor, shipping and receiving supervisor, assembly worker, laborer, and as a cook in many establishments. He also worked for numerous temporary agencies. (Exhibit Q)

On May 9, 2013, claimant sustained a work injury while he was in the employ of Spherion Temporary Agency. (Ex. I, page 1) Claimant reported to the Industrial Medical Clinic of Mobile, PC:

> Patient states that he was moving a pallet and after he was done he felt a pain in his groin and lower back.

(Ex. I, p. 1)

William J. McDowell. M.D., MPH, examined claimant. The physician found:

> Muscle spasm at left paraspinous area lumbar large knot 2x3cm tendwer [*sic*] there as well as grion [*sic*] on left neg SLR musch [*sic*] difficulty sitting up. VSS CV RRR PUlm Cl; r neuro no weakness walks stiff sit leaned to right side.

(Ex. I, p. 3)

Dr. McDowell diagnosed claimant with left lumbar muscle spasms and left groin strain. (Ex. I, p. 3) The physician placed claimant on restricted duty. Claimant was not to engage in pushing or pulling. (Ex. I, p. 3) Drug therapy was ordered. On May 17,

2013, claimant was referred to a specialist in urology. (Ex. I, p. 7) Effective May 30, 2013, claimant was placed on a no work capacity. (Ex. I, p. 11) Dr. McDowell released claimant to full duty work on July 8, 2013. (Ex. I, p. 13)

The admitted work injury occurred on July 28, 2014. Claimant presented to Terry W. Taylor, M.D., on August 1, 2014. Claimant reported to the physician, "he was trying to load a trailer on the truck, when he felt his lower back like popping. Patient state [*sic*] that it feels like a bubble in his lower back." (Ex. 1, p. 2)

Dr. Taylor diagnosed claimant with a sprain of the lumbar spine or lumbago with low back pain. (Ex. 1, p. 1) The attending physician restricted claimant from bending and from lifting more than 30 pounds. (Ex. 1, p. 1) Dr. Taylor related the condition, at least in part, to claimant's activities at CRST. Dr. Taylor noted claimant had a previous back injury in 2013 while he was working for Spherion Staffing. (Ex. 1, p. 3)

Claimant underwent MRI testing on August 27, 2014. Mark Goddard, M.D., interpreted the results as:

> 1. Disc protrusions at L2-L3 with mild central canal stenosis.
>
> 2. Mild to moderate left foraminal encroachment due to disc protrusion at L3-L4.
>
> 3. Right paracentral disc protrusion creates mild bilateral foraminal encroachment at L4-L5.
>
> 4. The approximate age of these protrusions is indeterminate.

(Ex. 3, p. 1)

On September 3, 2014, claimant returned to Dr. Taylor. The diagnosis remained the same following the MRI test results. Dr. Taylor referred claimant to an orthopedic specialist, James West, III, M.D.

Dr. West examined claimant on September 22, 2014. (Ex. 4, p. 1) The orthopedist noted the following about the imaging studies:

> **IMAGING STUDIES:** X-rays show lumbar degenerative changes, mild, at L5-S1 and L4-5. An MRI showed some encroachment with protrusion of disc on the left at L3-4 and on the right at L4-5. His chief complaint is on the left.

(Ex. 4, p. 1)

Dr. West recommended conservative treatment only. He arranged for an L4-5 epidural, physical therapy and drug therapy. Claimant was placed on light duty with no

lifting greater than 15 pounds. (Ex. 4, p. 1) Later the lifting restrictions were tightened to no lifting greater than 10 pounds. (Ex. 4, p. 4)

On December 17, 2014, claimant underwent a second MRI. The results showed:

> IMPRESSION: Focal left paracentral disc herniation at L2-3. Left posterior lateral disc protrusion L3-4 with left foraminal narrowing and mild spinal stenosis in the midline. Measurements given above.
>
> L4-5 posterior right side mild lateral disc protrusion with mild right foraminal narrowing but not clearly impinging the nerve root. Midline dural sac diameter of 9 mm at this level indicates mild spinal stenosis also.

(Ex. 6, p. 1)

In January of 2015, Dr. West examined claimant after a second epidural had been administered. Dr. West commented about claimant's levels of symptomatology. The physician opined the symptoms did not approximate claimant's level of encroachment. (Ex. 4, p. 7) Dr. West did not deem claimant to be a surgical candidate. (Ex. 4, p. 7)

Claimant participated in a functional capacity evaluation, (FCE) on February 26, 2015. (Ex. F, pp. 1-6) The occupational therapist deemed claimant capable of working in the light physical demand level of work. However, the therapist noted there were some inconsistencies in the performance of the FCE. As a consequence, claimant's functional capabilities were questionable. (Ex. F, p. 1)

Several weeks later, Dr. West rated claimant for a permanent partial impairment. The office note for March 4, 2015 stated:

> Patient returns today with lumbar degenerative disc issues exacerbated by his work related injury. Continued low back and paresthesia in his lower extremities. We obtained a FCE and the FCE demonstrates that he may only return to work in a light job category with 15 pounds or less. In my opinion, the patient is at MMI. He has a 5% impairment to the body as a whole, 2.5% related to his degenerative disc issues and 2.5% related to his work related injury. He may return to work within the guidelines of the FCE. We will see him back on an as needed basis.

(Ex. 4, p. 8)

Defendants sent claimant for an independent medical examination with William Crotwell, M.D., an orthopedist who specializes in the treatment of the hand. The examination occurred on June 23, 2015. Dr. Crotwell conducted a physical examination of claimant. The orthopedist noted in his report:

PHYSICAL EXAMINATION: The patient is alert and oriented x3. Neurovascularly intact. He has a flat affect. He is showing no signs of any pain, moving about without any difficulty. Ankles, knees, and hips have full range of motion. Normal tone and turgor. No subluxation or dislocation. No lesions seen. Gait and stance are normal. Upper extremities are normal. Respirations are normal. Heart rate is only 73. He was able to bend 80 or 90 degrees and take his socks off without any signs of any pain. When asked to stand for toe and heel walk, he could toe and heel walk normally, but flexion was only 50 percent and it was very exaggerated and a very poor attempt. There was no tenderness or spasms noted. Extension was even less, about 30, with even more exaggeration and poor attempt. The patient was then asked to sit down on the table and was able to get on the table without difficulty. His reflexes were +2 in the patella and Achilles. Motor was 5/5. Sensory was normal. Rotating the hips, which were normal, caused back pain. Straight leg raise sitting caused back pain right and left, but dorsiflexion of the feet did not change that in the sitting position. In the lying position, straight leg raise 80 on the right and he would push against and be able to hold it up, which is inconsistent. Plantar and dorsiflexion all caused the same pain. On the left 90 with plantar and dorsiflexion causing pain, he would also push against me, and was able to hold it up after I released it without any difficulty. Calves measured 15-1/2 inches each, thighs 18-1/2 inches each.

X-RAYS: X-rays taken today of the pelvis show valgus hips. **He was either standing crooked or the left pelvis is higher than the right pelvis. He may have some preexisting leg length inequality or scoliosis.** (Emphasis added.)

Looking at the lumbar films, five views, he has a little rotatory scoliosis of 15 to 20 degrees, has some facet changes at 4-5 and 5-S1. The lateral view shows some mild disk space collapse, has some anterior wedging, a little osteophyte, especially wedging at L4 with some preexisting arthritic changes and some disk space narrowing at 3-4, 4-5, and 5-S1.

. . . .

FCE: The FCE said maximum effort was not given. He had nine inconsistencies. They placed him in the light physical demand level of 15 pounds. He scored 2/5 on Waddell's. He had nine other inconsistencies and basically they put him in the light category, but said due to the inconsistencies that he could possibly do greater.

Impression:

1. Lumbar degenerative disk disease, (722.52), preexisting.

2. Lumbar strain, resolved, (847.2).

3. Possible history of radiculopathy, (722.73), but unsubstantiated by examination and testing.

SUMMARY: At the present time, in my opinion, there is an extensive amount of degenerative changes there at multiple levels and none are consistent with his examination and his examination is bizarre and very inconsistent. Also, noted throughout Dr. West's evaluation and inconsistent [*sic*], and noted through the FCE inconsistent, so therefore, to me, this patient has a definite tendency for symptom magnification and possible malingering. Personally I would not give this patient any PPI in reference to his on-the-job injury, because his description of what he was doing compared to his already arthritic changes, in no way gave him any permanent disability. I think the patient had preexisting conditions and he had a possible strain to the back, which went back to the preexisting conditions, and any disability should be related to the preexisting conditions and his severe arthritic changes.

In answering the questions:

1. Should Mr. Jones have any restrictions related to his on-the-job injury, as dictated by the FCE? I think the FCE gave him restrictions, but they also were stating that he was inconsistent and he could possibly do more than what the restrictions stated. So, if there were any restrictions given, I think they should be given for his preexisting condition.

2. Opine on permanent work restrictions consistent with claimant's functionality?. [*sic*] I think the patient can definitely carry out work in a greater amount than listed on the permanent work restrictions. I would give him no permanent work restrictions in relationship to his on-the-job injury, and I would give him very minimal in relationship to his disk and facet changes.

3. Opine whether the injury was a temporary exacerbation that returned to baseline with no additional permanent impairment? Yes, as I stated above, I think that he had a temporary exacerbation of symptoms which returned to the baseline and his baseline is a preexisting severe arthritic condition in the facet joints and his severe bulging and degenerative disk, which he had prior to this injury.

In summary again, with his severe inconsistencies, with his claims of pain 10/10 with no elevated heart rate, with his activity being totally

> reversed to this, it makes me think this patient is symptom magnifying and borderline malingering. Therefore, I think this patient could return to regular work activity with no restrictions.

(Ex. D, pp. 2-3)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. Sunil Bansal, M.D., M.P.H., a physician board certified in occupational medicine, examined claimant on October 12, 2015. (Ex. 10) Dr. Bansal diagnosed claimant with a "L4-L5 disc protrusion." (Ex. 10, p. 7) Dr. Bansal causally related claimant's spinal condition to claimant's work injury on July 28, 2014. (Ex. 10, p. 8) Dr. Bansal opined claimant had received inadequate treatment and was not at maximum medical improvement at the time the evaluation occurred. However, Dr. Bansal did perform a permanent impairment rating. The rating mechanism occurred as follows:

> With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides),** Table 15-3, based on his current symptomatology and physical examination, he meets the criteria for a DRE Category III impairment. He has a L4-L5 disc protrusion with loss of relevant reflexes and strength. He has continued pain. **He is assigned a 12% impairment of the body as a whole.**

(Ex. 10, p. 9) (Emphasis in original.)

With respect to permanent work restrictions, Dr. Bansal concurred with the restrictions imposed pursuant to the FCE that was conducted on October 13, 2015. (Ex. 10, p. 13) Even though Dr. Bansal opined claimant could benefit from additional treatment, the independent medical evaluator placed claimant at maximum medical improvement on November 3, 2014. (Ex. 10, p. 10)

On the same date as the independent medical evaluation with Dr. Bansal, claimant was deposed by defense counsel. Claimant testified his symptoms at the time included: "Numbness in the legs. Tingling in the legs and feet. Back and hip pains." (Ex. C, p. 59) Claimant was asked about the level of his pain on the date of his deposition. He answered:

> Q. (By Mr. Gregory Taylor) And if you had to rate your pain for your back on a scale of zero to 10, zero being no pain and 10 being, you know, intolerable excruciating pain, where would you rate your current pain?
>
> A. Right now probably a 7 or 8. It just depends on what I'm doing. If I'm sitting for a long period of time, my back starts hurting. If I get up and keep walking back and forth like I'm doing right now, my hip and back really bothers me, I do that to keep the numbness out of my feet. The

more I move around, the numbness will kind of go away a little bit, ease up.

Q. Other than the symptoms you were talking about to your back, your hip, and your legs, including your feet, are there any other symptoms that you're having?

A. No. That's it.

(Ex. C, p. 61)

In the same deposition, claimant testified he does not wear shoes that must be tied. He stated he wears "flip-flops" everywhere because his feet swell. (Ex. C, p. 68) He testified he does not wear a back brace. (Ex. C, p. 54) He testified after his second physical therapy session, he purchased a cane. (Ex. C, p. 54) Claimant also testified he and his spouse own a Dodge pickup truck, a Jeep Liberty, and a Cavalier. Claimant testified he usually drove the pickup truck because "The Cavalier is kind of low." (Ex. C, p. 70) Claimant also testified he no longer performed any yard work. (Ex. C, p. 71)

A subsequent telephonic deposition of claimant was taken on March 28, 2016. (Ex. B) A discussion ensued concerning the use of a cane. The questions and answers were as follows:

Q. (By Mr. Scheldrup) Now, you mentioned this in terms of using a cane. Is it your testimony, then, that since February 3, 2016, you've been using a cane full time?

A. Yes. When I'm moving, I put my back brace on, and when I get up to move, I do use my cane, sir. Sometimes I use crutches. It just depends on how I'm feeling.

Q. So in any event, depending on the level of symptoms you're experiencing, you're either using a cane full time, or you're having to use crutches in order to be able to walk; is that your testimony?

A. Yes, sir.

(Ex. B, pp. 31-32)

A short time later, the discussion returned to the use of assistive devices. Mr. Scheldrup continued with his questioning of claimant:

Q. This inability to walk without using a cane or now having to use crutches, when did that begin? Was it sometime after your deposition in October of 2015?

A. No. I had the cane when I was up there for my deposition. I had the cane, and I've been using it.

Q. But if I'm correct, you indicated that - - or you were claiming that you - - or acknowledging that you didn't use it all the time. Is it sometime soon after that deposition that your condition worsened that you had to use a cane or crutches all the time?

A. When I get up and I start moving, I have to.

Q. I just want to get the time frame. So do you remember the question was asked in October of 2015, and you said you used the cane at home. Now you're testifying that you use the cane all the time and are using crutches. When did the condition start getting worse such that you started using the cane all the time and on bad days having to use the crutches? Was it right after the deposition? Is that why you didn't tell us about it?

A. It was about - - one morning actually about a month ago I couldn't get up out of the bed. I was in the bed for a couple of days. Then when I got a chance to get up and go to the doctor, you know, both of my knees had swelled up. So they were testing me for gout or something, he was saying, but it came back - - the test came back negative on the gout. But my knees started swelling up, and it would be difficult to walk at times. So that's when I started using the crutches. I have crutches now.

But I'm on my cane most of the time, because when I have to get up and move, I'll put the back brace on. They told me at physical therapy, when I get up and move, put the back brace on. It will keep me from moving in the wrong direction, and I'll have the support. So I have my back brace on all the time when I'm up. I can't sleep in it, but when I'm up moving around, they told me to have it on. So I have it on.

Q. Have you been using - -

A. I have it on right now.

Q. I'm sorry sir. Have you been using the cane, though, full time since the deposition until it got worse, and then you had to start using the crutches?

A. When I get up and I move, I use the cane.

Q. And has that been true since the fall of last year, that you've had to use a cane to get around?

A. Yes, sir. It started at the beginning of this year. I've been on the cane every day since the beginning of this year. It ain't gotten better. It's gotten worse.

(Ex. B, pp. 33-35)

During redirect examination, defense counsel once again questioned claimant about the use of a cane. Mr. Scheldrup inquired:

Q. Sir, what's the farthest you think you can walk? Are you limited in the number of steps you can take?

A. No, there's no limit on it. I get up and walk several times a day. I have to get up and move around, because my feet get numb after I sit, or I lay down when my feet get numb. So I have to get up and walk until I can try to get the feeling back in them.

Q. And do you use your cane when you do that?

A. I might walk out of the house up and down the sidewalk a couple of times until I get the feeling back in my feet, and then I come back in and either sit down or lay down.

Q. Do you always use your cane when you're doing that?

A. Yes, I do. And I have my back brace on also, sir.

(Ex. B, p. 38)

Unbeknownst to claimant, defendants conducted surveillance of claimant on February 23, 2016. (Ex. A) The undersigned reviewed the surveillance disk on four separate occasions. The surveillance video depicted claimant walking and dialing a cell phone, stepping up on a curb, walking and talking on a cell phone, standing and talking on a cell phone, opening a door, (presumably a school door) walking his daughter to a white Chevrolet Cavalier, opening the back door of the vehicle, walking around to the driver's side of the car, opening the driver's door, getting into the vehicle and driving the vehicle. All of the activities were performed without the aid of a cane or crutches. Additionally, claimant was wearing shoes that tied. Claimant did have a slightly altered gait. (Ex. A)

Later that same afternoon, claimant was depicted on the video at a residence, (presumably his home) with another woman. Claimant was walking on uneven ground and standing briefly while the woman entered the driver's side of a pickup truck. Claimant again walked with a slightly altered gait. (Ex. A) He did not use a cane or crutches.

At his arbitration hearing, claimant testified he had reviewed the surveillance video. He testified he did not use his cane that day because he had taken medication, he was wearing his back brace and he was having a "good day." Claimant also admitted he did not use his cane on a daily basis. This was contrary to the testimony he provided in his second deposition. Claimant testified it was more difficult for him to exit the Cavalier than to enter the vehicle.

Claimant also testified at his hearing; he had not taken any medication or sleep aids since March 30, 2016. He did not have insurance but he was trying to obtain medical care through the Veterans' Administration. Claimant testified his feet are numb and he experiences tingling sensations in them. He testified his legs, knees and feet swell. He testified if he sits for too long, it is difficult to get up from the chair and he "feels like a bunch of noodles." Claimant testified he is unable to work in a job that requires sitting due to the tingling and burning in his feet. Claimant testified he is unable to work as a truck driver.

Counsel for both claimant and the defense retained the services of vocational specialists. Claimant retained the services of Mr. Phil Davis. He was retained to provide a vocational opinion with regard to the vocational implications of claimant's work injury of July 28, 2014. Defendants hired Ms. Lana Sellner. She not only conducted a vocational assessment but she also testified at the arbitration hearing.

Mr. Davis concluded claimant was only capable of performing work falling within the sedentary to limited aspect of the light physical demand level of labor as defined by U.S. Department of Labor. Mr. Davis opined less than 10 percent of all jobs in this country fell within the sedentary worker classification. When Mr. Davis considered claimant's education and prior work experience, the vocational specialist opined claimant had lost 100 percent access to his pre-injury labor market. (Ex. 15, p. 8)

On the other hand, Ms. Sellner held a different opinion with respect to employability. She opined:

> Based upon the information presented, it is this consultant's opinion that Mr. Jones' [*sic*] continues to be employable. Mr. Jones is still considered an employee of CRST. This consultant has identified occupations that Mr. Jones's [*sic*] would be within the restrictions imposed by Dr. West, his work experience, and skill set. Again, it should be noted the FCE was deemed inconsistent, however it was adopted by Dr. West. In addition, if considering the [*sic*] Dr. Crotwell's opinion there is no vocational impact and Mr. Jones' [*sic*] is able to be a successful employee in all of his prior work experiences.
>
> If Mr. Jones' [*sic*] chooses to terminate his employment with CRST, a labor market survey identified alternative occupations that are open and viable in his geographical area to pursue.

> In addition, Mr. Jones reported he gets calls from temp agencies and driving companies almost daily which shows potential employers see Mr. Jones' [*sic*] work experience and skill level as assets to their company. It is unclear why he has not accepted any of these employment opportunities.

(Ex. G, p. 12)

RATIONALE AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition

of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Claimant has met his burden of proof with respect to the issue of medical causation. Both Dr. West and Dr. Bansal opined claimant had a permanent spinal condition that was related to claimant's work injury on July 28, 2014. Since the spinal condition is an injury to the body as a whole, claimant has sustained an industrial disability. The more perplexing question is the extent of disability to which claimant is entitled.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The commissioner, as trier of fact, has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The credibility of claimant with respect to the extent of his injuries was challenged vigorously by defendants. In the first deposition, claimant denied wearing a back brace but admitted he used a cane after he attended his second physical therapy session. Claimant denied ever wearing shoes that tied; he only wore "flip-flops." He testified he primarily drove his Dodge pickup truck as the Cavalier was too low for him to navigate.

In the second deposition, claimant testified he always wore a back brace, walked with a cane or if he was really suffering, he used crutches. Claimant was unbending when he testified he had been using a cane since the beginning of 2016. Moreover, claimant reported his condition had not improved; it had deteriorated.

The surveillance video did not depict a person who was in extreme pain. Claimant's gait was somewhat altered but this may be due to some preexisting leg length inequality or scoliosis that was demonstrated on x-rays of the pelvis. (Ex. D, pp. 2-3) Claimant was able to step from a curb, walk and dial a cell phone, walk and talk on a phone, and enter the Cavalier, which he described as "kind of low." All of the activities were done without the benefit of a cane or crutches. He was wearing shoes that tied. Claimant did not appear to be someone who often described his pain as anywhere from 7 to 10 on an analog pain scale with 10 being the most excruciating pain imaginable.

There were 3 impairment ratings provided for claimant's spinal condition. Dr. Crotwell determined claimant had no permanent impairment. Dr. West determined claimant had a permanent impairment in the amount of 5 percent, but only 2.5 percent was attributed to the work injury in question. Dr. Bansal opined the permanent impairment was 12 percent.

Dr. West placed claimant in the light physical demand level. Claimant was restricted to lifting no more than 15 pounds. There were 9 inconsistencies in the FCE upon which Dr. West relied. Claimant is not a surgical candidate.

Dr. Bansal relied upon the October 13, 2015 FCE. Mr. Marc Vander Velden, DPT, placed claimant in the light to sedentary physical demand categories of work. (Ex. 9, p. 1) According to the physical therapist, claimant had major restrictions in the range of motion of his back due to pain that prevented him from squatting, kneeling, bending, and lifting from floor to waist level. (Ex. 9, p. 2)

Claimant is currently 50 years old. He holds a current Alabama commercial driver's license. CRST Van Expedited, Inc., does not have a position for claimant. He believes he is incapable of working. However, in light of the surveillance video, claimant does not appear as physically impaired as he has represented. He worked for his spouse's travel agency handing out brochures and driving a small bus or van. Claimant discontinued his role in her business. The undersigned is unclear why claimant no longer works for the travel agency. He does have an active role in caring for his 2 minor children.

After considering all of the factors involving industrial disability, it is the determination of the undersigned deputy workers' compensation commissioner; claimant has sustained a permanent partial disability in the amount of twenty-five (25) percent. Defendants shall pay unto claimant one hundred-twenty-five (125) weeks of permanent partial disability benefits commencing from March 4, 2015. (See: Ex. 4, p. 9)

The next issue for resolution is the weekly benefit rate to which claimant is owed. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant and defendants stipulated claimant was married and entitled to four exemptions at the time of the work injury. The undersigned finds the most reasonable manner with which to calculate claimant's weekly benefit rate is computed in claimant's Exhibit 19. The rate calculation is duplicated below.

Weeks	Date	.23 per mile Miles	Mileage Paid
1	4/6 – 4/12/14	2200.00	506.00
2	4/13 – 4/19/14	1060.48	243.91
3	4/20 – 4/26/14	2393.50	550.51
4	4/27 – 5/3/14	1492.50	343.28
5	5/11 – 5/17/14	1218.00	280.14
6	5/18 – 5/24/14	1762.50	405.38
7	5/25 – 5/31/14	1802.50	414.58
8	6/1 – 6/7/14	1491.00	342.93
9	6/8 – 6/14/14	2473.00	568.79
10	6/22 – 6/28/14	2014.00	463.22
11	7/6 – 7/12/14	777.00	178.71
12	7/13 – 7/19/14	3237.00	744.51
13	7/20 – 7/26/14	3531.00	812.13
			5,854.07

AVERAGE WEEKLY INCOME	$450.31
NUMBER OF EXEMPTIONS	4.00
WEEKLY RATE	$322.04

(Ex. 19, p. 1)

It is the determination of the undersigned; claimant's weekly benefit rate is $322.04. Defendants shall pay claimant at this rate and shall reimburse claimant for all underpayments.

The next issue for resolution is the matter of the cost of medical benefits incurred since defendants stopped paying for claimant's medical treatment. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Claimant has detailed the medical costs he incurred since defendants stopped paying the medical bills. The costs are listed in Exhibit 18. Defendants are liable for the same.

With respect to medical care pursuant to Iowa Code section 85.27, defendants shall continue to provide care with James West, M.D., and Edward M. Schnitzer, M.D., and such other providers as these physicians deem appropriate to treat claimant for this work injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred and twenty-five (125) weeks of permanent partial disability benefits at the weekly benefit rate of three hundred twenty-two and 04/100 dollars ($322.04) per week and commencing from March 4, 2015.

Accrued benefits shall be paid in a lump sum, together with interest, as allowed by law.

Defendants shall take credit for all benefits previously paid to date.

Defendants are liable for the medical costs incurred and as detailed in claimant's Exhibit 18.

Defendants shall pay the costs to litigate this claim.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this 3rd day of November, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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MAM/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.